Supreme Court of the United States

No. ..... , Original, October Term, 1941

EX PARTE THE STATE OF TEXAS, ET AL.,
PETITIONERS

MOTION OF LONE STAR GAS COMPANY FOR LEAVE TO INTERVENE AND TO FILE OPPOSITION TO THE MOTION FOR LEAVE TO FILE THE PETITION FOR WRIT OF MANDAMUS IN THE NATURE OF PROCEDENDO, AND FOR PERMISSION TO FILE BRIEF IN SUPPORT OF SAID OPPOSITION; OPPOSITION TO THE MOTION FOR LEAVE TO FILE THE PETITION FOR MANDAMUS IN THE NATURE OF PROCEDENDO; AND BRIEF IN SUPPORT OF SAID OPPOSITION.

SUBJECT INDEX

AUTHORITIES

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EX PARTE THE STATE OF TEXAS, ET AL.,
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MOTION OF LONE STAR GAS COMPANY FOR LEAVE TO INTERVENE AND TO FILE OPPOSITION TO THE MOTION FOR LEAVE TO FILE THE PETITION FOR WRIT OF MANDAMUS IN THE NATURE OF PROCEDENDO, AND FOR PERMISSION TO FILE BRIEF IN SUPPORT OF SAID OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now Lone Star Gas Company and respectfully moves that it be permitted to intervene herein and file its Opposition to the Motion for Leave to File the Petition for Writ of Mandamus in the Nature of Procedendo, and its Brief in support of such Opposition, and in this behalf shows:

I.

The Lone Star Gas Company (hereinafter referred to as the Company) is a corporation duly in-

corporated under the law of the State of Texas, with its principal place of business at Dallas, Texas. It was appellant in the case of Lone Star Gas Company v. State of Texas, et al., No. 313, October Term 1937, in which the judgment of this Honorable Court was entered on May 16, 1938, and on which a mandate was issued June 13, 1938. The opinion of this Honorable Court in this case is reported in 304 U. S. 224.

II.

The Company was and is plaintiff in error in the case of Lone Star Gas Company, Plaintiff in Error, vs. State of Texas, et al., Defendants in Error, decided by the Supreme Court of Texas on April 30, 1941. By its judgment then entered, the Supreme Court of Texas reversed in favor of the Company a judgment of the Court of Civil Appeals adverse to it. The opinion of the Supreme Court of Texas, designated as Exhibit H, is attached to the Petition herein (Petition, p. 493). The judgment of that Court, designated as Exhibit I, is attached to the Petition herein (Petition, p. 545).

III.

In this proceeding the petitioners herein seek to obtain from this Court a writ of mandamus in the nature of procedendo directing the Supreme Court of Texas first to set aside and vacate its said judgment of April 30, 1941, and then to take further proceedings in said case under certain stated conditions and limitations. (Petition, pp. 17-18.)

IV.

The Company is not joined as a party in this proceeding wherein petitioners seek to vacate a judgment of the Supreme Court of Texas favorable to it. It was and is interested in said judgment, and, if not permitted to intervene, would be deprived of its day in court concerning its rights under said judgment. In support of its right to intervene to protect its interest it cites the decision of this Court in *Missouri-Kansas Pipe Line Company v. United States*, 312 U. S. 502 (Preliminary Print), and Federal Rule 24a(2), by analogy.

V.

The movant attaches hereto, and under the same cover, copy of its Opposition to the Motion for Leave to File the Petition for Writ of Mandamus in the Nature of Procedendo, and copy of its Brief in support of such Opposition. The Petitioners and the Respondent Justices have agreed that it may intervene herein and may file the said Opposition and the said Brief, copies of which have been delivered to them; all as shown by written agreement and acknowledgment of service signed by the Petitioners and said Respondents and filed with the Clerk of this Court.

Accordingly, it prays that it be granted leave to intervene herein and to file its Opposition to the Motion for Leave to File the Petition for Writ of Man-

damus in the Nature of Procedendo, and to file its Brief in support of such opposition.

LONE STAR GAS COMPANY,
By: ROY C. COFFEE,
MARSHALL NEWCOMB,
OGDEN K. SHANNON,
BEN H. POWELL,
CHARLES L. BLACK,
Its Counsel.

The State of Texas }
County of Travis }

Before me, the undersigned authority, on this day personally appeared Charles L. Black, who, being by me duly sworn, states on oath that he is one of the attorneys for the Lone Star Gas Company in the case pending in the Supreme Court of Texas and referred to in the foregoing Motion. He further states that he is one of the attorneys for said Lone Star Gas Company in this proceeding and is authorized to make this affidavit on its behalf; and that the facts stated in the foregoing Motion are true.

CHARLES L. BLACK.

Subscribed and sworn to before me, the undersigned authority, on this the 4th day of November, A. D. 1941.

CATHERINE CONNOLLY.

Notary Public in and for Travis County, Texas

[Seal]

Supreme Court of the United States

No......, Original, October Term, 1941

EX PARTE THE STATE OF TEXAS, ET AL.,
PETITIONERS

OPPOSITION OF LONE STAR GAS COMPANY TO MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS IN NATURE OF PROCEDENDO

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Lone Star Gas Company, having been permitted to intervene herein, now respectfully submits its Opposition to the Motion for Leave to File Petition for Mandamus in the Nature of Procedendo.

Said Motion for Leave to File Petition for Writ of Mandamus in the Nature of Procedendo is insufficient in law and should be denied upon the following grounds:

I.

This Court is without jurisdiction to issue the writ of mandamus in the nature of procedendo to the State Supreme Court.

II.

The construction applied to the opinion of this Court by the Supreme Court of Texas is clearly correct.

III.

The proceedings taken in the Supreme Court of Texas were not "inconsistent with the opinion of this Court."

IV.

The motion for leave to file the petition for mandamus should be denied because, if the judgment that petitioners seek to have vacated were a final judgment, this Court would not entertain jurisdiction to review it on certiorari or appeal. This is because the record shows affirmatively that the judgment of the State Court rests upon a non-federal ground adequate to support it.

V.

The motion for leave to file the petition for mandamus in the nature of procedendo should be denied because the State Supreme Court has already "proceeded" to a decision. The writ prayed for by petitioners is, in substance, a writ to compel the State Supreme Court to reverse its decision already made and to render a new decision in a given way.

WHEREFORE, it prays that petitioners' Motion for Leave to File a Petition for a Writ of Mandamus

in the Nature of Procedendo be denied, or, if leave to file is granted, that the petition for the writ of mandamus in the nature of procedendo be denied.

LONE STAR GAS COMPANY,

By: ROY C. COFFEE,
MARSHALL NEWCOMB,
OGDEN K. SHANNON,
BEN H. POWELL,
CHARLES L. BLACK,

Its Counsel.

Supreme Court of the United States

No......, Original, October Term, 1941

EX PARTE THE STATE OF TEXAS, ET AL., PETITIONERS

BRIEF SUBMITTED BY LONE STAR GAS COMPANY IN SUPPORT OF OPPOSITION TO THE MOTION FOR LEAVE TO FILE A PETITION FOR THE WRIT OF MANDAMUS IN THE NATURE OF PROCEDENDO

Statement of the Case

It is believed that the questions involved herein can be better understood with the aid of a fuller statement of the history of the litigation than is contained in the Petition. Hence this Statement of the Case is submitted. It will be based upon the exhibits attached to the Petition and upon the reported opinion of this Court *(Lone Star Gas Co. v. Texas*, 304 U. S. 224), and that of the Court of Civil Appeals when the case was first before it *(State of Texas v. Lone Star Gas Co.*, 86 S. W. 2d 484).

The proceedings in the case material for present purposes are:

1. "The Railroad Commission of Texas brought this action, under Article 6059 of the Revised Civil

Statutes of Texas, to enforce the Commission's order of September 13, 1933, prescribing the rate for domestic gas supplied by appellant, Lone Star Gas Company, to distributing companies in Texas." (304 U. S. 226.)

Article 6059 is the statute of the State of Texas authorizing judicial review of rate orders of the Railroad Commission and defining the scope of review. This statute is quoted in the opinion of the State Supreme Court (Petition, p. 516). It confers the right to have the rate orders of the Commission set aside upon a finding that the same are "unreasonable and unjust" to the gas utility or other party at interest. This is a distinct ground and broader than the constitutional ground where confiscation alone is charged. The statutory and constitutional ground may both be asserted in the same suit. *Railroad Commission v. H. & T. C. Ry. Co.*, 90 Tex. 340, 353-355; *L. & N. R. R. Co. v. Garrett*, 231 U. S. 298, 311, 313, 314.

The Lone Star Gas Company had previously brought suit in the Federal Court, "attacking the rate on constitutional grounds, but that court stayed its proceedings when the present action was brought by the Commission." (304 U. S. 227.) The Lone Star Gas Company filed its answer in the State Court, seeking to set aside the rate order and to restrain its enforcement, and its suit was in effect an appeal by it under Article 6059, before referred to. It alleged "that the rate order was violative of the commerce, the due process, the equal protection . . . clauses; and was confiscatory and unreasonable and unjust because it would not afford a reason-

able return on the fair value of its property. . " (86 S. W. 2d 487.) The suit thus involved the statutory, as well as the constitutional, ground of invalidity—the claim that the rate was unjust and unreasonable under Article 6059, as well as the claim that it was confiscatory.

2. "The trial on the merits, before a jury, was begun on June 11, 1934, and was entirely *de novo.*" (304 U. S. 228.) The trial of such a case to a jury is authorized by the State law and has been upheld by this Court. *United Gas Co. v. Texas*, 303 U. S. 123, 140, 141.

The State Supreme Court, interpreting the review statute, Article 6059, held that this statute requires a trial de novo, in which the reviewing court is empowered to settle the conflicts in the evidence. Its rulings in that connection and in previously decided cases are fully set forth in its opinion. (Petition, Exhibit H, pp. 515-534.) See also the Return of the Respondent Justices.

"When the evidence was closed, each party moved that a verdict be directed in its favor and both motions were denied." (304 U. S. 230.)

The court then submitted the case to the jury on a single special issue, set forth in this Court's opinion. (304 U. S. 231.) The jury, under this special issue, found that the rate "was unreasonable and unjust as to the defendant Lone Star Gas Company."

The special issue was accompanied by certain definitions, including a definition of "fair return" and "unreasonable and unjust," so restrictive in character that this Court held that only the issue of

confiscation was submitted; the Company was denied the right to have the jury determine whether the rate was unjust and unreasonable even if not confiscatory. (304 U. S. 231.)

Judgment was entered upon this verdict enjoining the enforcement of the Commission's rate order.

3. The Commission then appealed to the Court of Civil Appeals. The powers of that Court over the facts of a case are correctly stated in the opinion of this Court (304 U. S. 231); and in the Return of the Respondent Justices, pp. 11-12).

4. The Court of Civil Appeals, upon its first review of the case, reversed the judgment of the District Court and held as a matter of law that the prescribed rate was "just, reasonable and valid in every particular," and *rendered* judgment dissolving the injunction granted in the court below and upholding the order. (86 S. W. 2d 506.) In that connection the Court of Civil Appeals held that the Gas Company "did not adduce the quantum and character of proof necessary to establish the invalidity of the rate as being confiscatory or unreasonable and unjust" because it did not make a segregation of its properties and business operations as between the State of Texas and the State of Oklahoma or as between local and interstate commerce.

5. Appeal was taken to this Court, and the judgment of the Court of Civil Appeals was reversed and the cause remanded, under the usual mandate, "for further proceedings not inconsistent with this opinion." (304 U. S. 242.) This Court held that the Court of Civil Appeals had erred in its ruling as

to the necessity for segregation of properties and business operations and had thereby applied to the evidence an improper criterion or standard of proof, and held that "the determination of the court of first instance as the trier of the facts that the Commission's rate was confiscatory could not properly be set aside by the application of an untenable standard of proof and in disregard of the evidence which had been appropriately addressed to the Commission's findings and had been properly submitted to the jury." (304 U. S. 242.)

6. The case coming back to the Court of Civil Appeals, briefs were then filed, discussing the question as to what proceedings were proper under the mandate. The Gas Company contended that this Court, in reversing the Court of Civil Appeals for applying an improper standard of proof in determining the sufficiency of the evidence, had necessarily arrived at the conclusion and had decided that the evidence was sufficient to require the submission of the issue of confiscation to the jury and sufficient to sustain their findings; that otherwise, the reversal was upon an immaterial ground. Petitioners contended that the Court of Civil Appeals had full power, unrestricted by the mandate, to again consider and determine the legal sufficiency of the evidence and to make the same ruling that it made on its first review of the case; that is, that the evidence was insufficient as a matter of law to raise the issue of confiscation.

The latter view was sustained by the Court of Civil Appeals, and it again reviewed the evidence and held that it was insufficient in law to raise the issue of confiscation and again *rendered* the same

judgment as before—that is a judgment upholding the rate order and declaring the same "to be just, reasonable and valid in every particular."

The Court of Civil Appeals discussed in its opinion the scope of judicial review that is available under the State statute (Article 6059) and in that connection held that "the findings of the Railroad Commission are final and conclusive on issues of fact if the evidence is conflicting on such issues." It held that where the evidence is conflicting, the rate order must be upheld as a matter of law, thus denying the right of the district court to settle conflicts in the evidence and determine matters of weight and credibility. (Return of Justices, p. 4, 5, 10.)

7. Writ of Error was granted by the Supreme Court of Texas, and upon hearing that Court held (a) that this Court had necessarily considered and determined the sufficiency of the evidence to raise the issue of confiscation and to support the finding of the District Court resolving that issue against the validity of the rate order; and (b) that the Court of Civil Appeals had erred in construing and applying Article 6059, the State review statute. The State Supreme Court in that connection held that a trial under that statute is *de novo* and that the court (the District Court) is fully empowered to settle the conflicts in the evidence and to determine all matters of weight and credibility; and that the Court of Civil Appeals had erred in holding that the rate order of the Commission must be sustained if it is based on substantial evidence and erred in holding that the reviewing court is without power to resolve

conflicts in the evidence. Its rulings are summarized in the Return of the Justices, pages 4-12. Concluding its discussion of the statute, the State Supreme Court said:

"From all that we have said it is evident that that part of the judgment of the Court of Civil Appeals which renders judgment for the State and the Railroad Commission upholding this gas rate order cannot stand. We shall now examine this record to determine whether we will affirm the judgment of the district court or reverse the same, and remand the cause for a new trial." (Petition, pp. 533-534.)

The Court then proceeded to the consideration of other questions raised by the petitioners and held that the trial court had committed certain trial errors, and on that account reversed the judgment of lower court and remanded the case for another trial. (Petition, pp. 534-543.)

8. Thereupon, the defendants in error in the State Supreme Court (petitioners here) filed their motion for rehearing and therein assailed the two distinct and independent rulings made by the State Supreme Court: *First*, its ruling as to the construction and proper application of the opinion and mandate of this Court; and, *secondly*, its ruling as to the construction and proper application of the State statute, Article 6059. These rulings were assailed as distinct grounds, each supporting the judgment of the Supreme Court of Texas. (Motion for Rehearing, Petition, pp. 548, 555, 568.)

It was claimed in this motion that the State Supreme Court had incorrectly construed the opinion

of this court, but it was not claimed that the Court had evaded, obstructed or violated in any manner the mandate of this Court. The motion for rehearing was overruled. (Petition, p. 585.)

9. Thereupon the petitioners filed here their Motion for Leave to file Petition for a Writ of Mandamus in the Nature of Procedendo, upon the ground that the decision of the State Supreme Court in effect violated the mandate previously issued out of this Court and directed to the Court of Civil Appeals. Petitioners in their petition do not state the separate and independent ground, arising under the State law, upon which the State Supreme Court rested its decision. They make no reference to the fact that in their motion for rehearing filed in that court they in effect admitted that the Court's judgment rested not only upon its construction of the opinion of this Court but also upon its construction and application of the State statute.

10. Petitioners did not join the Lone Star Gas Company as a party although it affirmatively appears from the Petition that, in order to cast upon the State Supreme Court the duty to "further proceed" in the case, it was necessary for the petitioners to ask this Court to direct the State Supreme Court to vacate its judgment already rendered in favor of the Lone Star Gas Company; and in that way to do substantially the same as could have been done if a final judgment had been rendered and the case had been brought under direct review by certiorari or appeal. (Petition, p. 18, *post* pp. 27-29.)

Point One

This Court is without jurisdiction to issue the writ of mandamus in the nature of procedendo to the State Supreme Court.

1. Petitioners invoke the jurisdiction of this Court under Section 262 of the Judicial Code (28 U.S.C. §377.) That statute reads:

"The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

The power here given is to issue all writs "not specifically provided for by statute." Section 234 of the Judicial Code (28 U. S. C., Sec. 342) makes specific provision for the issuance of the writ of mandamus as follows:

"The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice consul is a party."

The issuance of the writ of mandamus here specifically provided for is only to "courts appointed under the authority of the United States." No authority is given to issue the writ to State courts.

Section 237 of the Judicial Code (28 U. S. C., Section 344) defining the appellate jurisdiction of this Court in respect to decisions of the highest court of a State, provides:

"(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had . . . may be reviewed by the Supreme Court upon appeal. The appeal shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the appeal."

The Court here is given jurisdiction to review *final* judgments of the highest courts of the State and to "reverse, modify or affirm the judgment" and to "award *execution* or remand the cause to the court from which it was removed by the appeal." No power is granted to review judgments of the State courts, not final in nature. No power is expressly given to issue a writ of mandamus to enforce the judgment rendered by this Court in a case coming to it from a State court.

To imply the power to issue the writ of mandamus to reverse or vacate an interlocutory judgment, or other judgment of a State court that is not final,

would be to enlarge by implication the jurisdiction of this Court beyond the limits definitely fixed by the Congress.

In *Bank of Columbia v. Sweeny*, 1 Peters 567, 569, the Court, in a case where mandamus was applied for to set aside an interlocutory order of a Circuit Court, said:

"If this motion could now prevail, it would be a plain evasion of the provision of the Act of Congress, that *final* judgments only should be brought before this Court for reexamination."

This decision was followed in *American Construction Co. v Jacksonville, etc. Ry. Co.*, 148 U. S. 372, 379 and in *Ex parte Wagner*, 249 U. S. 465.

The decisions of this Court made in cases where mandamus was applied for to compel district courts to set aside orders remanding cases to the State courts are believed to be applicable. Section 71, Title 28, U.S.C., provides that when any cause has been remanded by a district court of the United States to the State court from whence it came "no appeal or writ of error from the district court so remanding such cause shall be allowed." The Court has held that in such a case mandamus to compel the district court to vacate the order of remand will not be granted. Denial by the Congress of authority to review such an order by the simple and direct remedies of appeal or writ of error has been treated as an implied denial of the right to review the order by use of the writ of mandamus. *Kloeb v. Armour &*

Company, 311 U. S. 199; *In re Pennsylvania Co.*, 137 U. S. 451, 454.

In a case where mandamus was applied for to bring under review certain action of the Interstate Commerce Commission not subject to more direct review, this Court, in an opinion by Mr. Justice Cardozo, said:

"The policy of the law has been to give finality to orders of the Commission negative in form and substance, and to keep them out of the courts. *Standard Oil Co. v. United States, supra; Alton R. Co. v. United States, supra; Proctor & Gamble Co. v. United States, supra; B. & O. R. Co. v. Brady, supra.* A dissatisfied complainant is not permitted to escape these limitations indirectly by broadening the functions of mandamus when he is barred from more direct review. *I. C. C. v. Waste Merchants Ass'n, supra*, p. 35. There have been like attempts before in other branches of the law of remedies. *In re Pennsylvania Co.*, 137 U. S. 451, 454; *Missouri Pacific Ry. Co. v. Fitzgerald*, 160 U. S. 556, 581. They have met with no success." *Interstate Commerce Commission v. United States*, 289 U. S. 385, 394.

In *Ex parte Park & Tilford, Petitioners*, 245 U. S. 82, 86, the Court said that: "The fact that the law makes the decision of the United States Court of Customs Appeals final in this class of cases does not broaden the authority of this court to issue writs of the character now invoked"—a writ of mandamus.

Mandamus may not be utilized in lieu of appeal where the Congress has withheld the right of appeal.

The legislative finding that a judgment ought not to be subjected to the simpler and more direct methods of review provided by certiorari and appeal carries with it, by plain implication, the finding that the same judgment ought not to be subject to review by use of the extraordinary writ of mandamus.

The statutes here referred to have been in force in substantially the same form since 1789. They appear in the Judiciary Act of 1789 as Sections 13 (now Section 234 of the Judicial Code), 14 (now Section 262 of the Judicial Code), and 25 (now Section 344(a) of the Judicial Code). Petitioners have cited no case in which this Court has issued the writ of mandamus to a State court to compel the latter to vacate its judgment because of noncompliance with the mandate of this Court, and we have found none.

In *Tyler v. Magwire*, 17 Wall. 253, 289-293, the Court, dealing with a case where the State court had refused to comply with its mandate, reversed the judgment of the State court on a second writ of error and rendered final judgment for plaintiff in the case.

Similar action was taken in *Martin v. Hunter's Lessee*, 1 Wheaton 304, 354-362. In the main opinion by Mr. Justice Story the Court stated that it had "not thought it incumbent on us to give any opinion upon the question, whether this Court has authority to issue a writ of mandamus to the Court of Appeals to enforce the former judgments, as we do not think it necessarily involved in the decision of this cause." (1 Wheaton 362.) In his concurring opinion Mr. Justice Johnson expressed the view that the power referred to did not exist. We quote the following from his opinion:

"The language, sense, and operation of the 25th section on this subject, merit particular attention. In the preceding section, which has relation to causes brought up by writ of error from the Circuit Courts of the United States, this Court is instructed not to issue executions, but to send a special mandate to the Circuit Court to award execution thereupon. In case of the Circuit Court's refusal to obey such mandate, there could be no doubt as to the ulterior measures; compulsory process might, unquestionably, be resorted to. Nor, indeed, was there any reason to suppose that they ever would refuse; and, therefore, there is no provision made for authorizing this Court to execute its own judgment in cases of that description. But not so, in cases brought up from the State Courts; the framers of that law plainly foresaw that the State Courts might refuse; and not being willing to leave ground for the implication, that compulsory process must be resorted to, because no specific provision was made, they have provided the means, by authorizing this Court, in case of reversal of the State decision, to execute its own judgment. In case of *reversal* only was this necessary; for, in case of affirmance, this collision could not arise. It is true, that the words of this section are, that this Court may, *in their discretion*, proceed to execute its own judgment. But these words were very properly put in, that it might not be made imperative upon this Court to proceed indiscriminately in this way; as it could only be necessary in case of the refusal of the State Courts; and this idea is fully confirmed by the words of the 13th section, which restrict this Court in issuing the writ of mandamus, so as to confine it expressly to those Courts which are constituted by the United States. (1 Wheaton 365-366, italics by the Court.)

While the Court in *Martin v. Hunter's Lessee*,

supra, was directly concerned with Section 25 of the Judiciary Act of 1789 (the forerunner of Section 344 of the Judicial Code, *supra)*, Justice Johnson in his opinion expressly considered Section 13 of that Act (now Section 234 of the Judicial Code, *supra)*, and, necessarily, its limiting effect upon Section 14 of that Act (now Section 262 of the Judicial Code, *supra)*. The Judiciary Act of 1789 was a carefully integrated statute and to arrive at its true construction it was necessary that it be so considered. It was so considered by Mr. Justice Johnson, and the same consideration should be given to it today when the Court is called upon to construe substantially the same statutory provisions.

At the outset of his opinion Mr. Justice Johnson said:

"It will be observed in this case, that the court disavows all intention to decide on the right to issue compulsory process to the state courts; thus leaving us, in my opinion, where the constitution and laws place us, supreme over persons and cases as far as our judicial powers extend, but not asserting any compulsory control over the state tribunals." (1 Wheaton 362.)

He thus concluded his opinion:

"With this view, by means of laws, avoiding judgments obtained in the state courts in cases over which congress has constitutionally assumed jurisdiction, and inflicting penalties on parties who shall contumaciously persist in infringing the constitutional rights of others—under a liberal extension of the writ of injunction and the *habeas corpus ad subjici-*

endum, I flatter myself that the full extent of the constitutional revising power may be secured to the United States, and the benefits of it to the individual, without ever resorting to compulsory or restrictive process upon the State tribunals; a right which, I repeat again, congress has not asserted, nor has this court asserted, nor does there appear any necessity for asserting." (1 Wheaton 381-382.)

And we can correctly state at the present time that "Congress has not asserted, nor has this Court asserted," during the intervening one hundred and twenty-five years, the right to issue the writ of mandamus to a State court, "nor does there appear any necessity for asserting" that power in this case.

In *In Re Blake*, 175 U. S. 114, it was held that a second appeal and not mandamus is the appropriate remedy where the State court has failed to carry out the mandate of this Court.

In *Graham v. Norton*, 15 Wall. 427, mandamus was granted by a federal district court at the suit of an assignee in bankruptcy, against a state auditor, to compel him to pay over certain taxes which had been illegally collected by the State. The circuit court affirmed. Reversing the judgment, this Court said:

"We are of opinion that neither the District nor the Circuit Court had jurisdiction to issue a writ of mandamus in this case. This court has held that the writ may be used for the purpose of enforcing a judgment rendered by the Circuit Court, where its use by the State court for that purpose is sanctioned by State laws, but in such cases it is used as a process for the enforcement of judgments and not as an original proceeding.

"In the thirteenth section of the Judiciary Act this court is clothed with power to issue 'writs of mandamus in cases warranted by the processes and usages of law to any courts appointed or persons holding office under the authority of the United States.' This express authority to issue writs of mandamus to National courts and officers has always been held to exclude authority to issue these writs to State courts and officers. The only exception is that just adverted to, where they have been issued as process to enforce judgments." (Per Chief Justice Chase.)

The exception to which the Chief Justice refers is the use of the writ of mandamus by the *nisi prius* federal court, under Section 14 of the Judiciary Act of 1789 (Section 262 of the Judicial Code, *supra)*, for the purpose of enforcing its judgment where the use of the writ for that purpose is sanctioned by State laws. In such cases the writ is used as a process for the enforcement of the judgment and not as an original or appellate proceeding. Thus used—and it was so used in *Riggs v. Johnson County*, 6 Wall 166—the writ of mandamus is essentially a writ of execution.

In line with the view of the Chief Justice that Federal Courts do not have authority to issue writs of mandamus to State courts is *Ableman v. Booth*, 21 How. 506. Here, this Court declined to issue a writ of mandamus to a State court even though that court was in open rebellion against the process issued out of this Court. Compare, in a somewhat analogous situation, the practice of this Court where a Federal Court is involved. *Ex parte Abdu*, 247 U. S. 27.

Commentators are in accord that mandamus does not lie to a State court. Frankfurter & Shulman, *Cases on Federal Jurisdiction and Procedure* (Rev. Ed. 1937), p. 646, note 1; Moore, *Federal Practice* (1938), Vol. 3, p. 3652, n. 1; Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, p. 24; Zoline, *Federal Appellate Jurisdiction and Procedure*, Sec. 652; Evans, *Jurisdiction in Mandamus in the United States Courts*, (1885), 19 American Law Review, pp. 505-544; Sloss, *Mandamus in the Supreme Court* (1932), 45 Harvard Law Review, pp. 91-95.

Petitioners cannot evade this rule, entrenched in time and policy, by calling their petition a petition for the writ of mandamus "in the nature of procedendo." Its nature is to be determined by actual fact and not by terminology. The writ they are applying for is precisely the opposite of a procedendo. "A procedendo is a writ from a higher to a lower court directing that the case be proceeded with without undertaking to say what the decision shall be but merely that there shall be one." (8 Hughes, *Federal Practice*, Section 5651.) See also Rule 31 of this Court; *State ex rel. Davey v. Owen*, 133 Ohio St. 96, 12 N. E. (2d) 144, 114 A. L. R. 686, 692-693.

The decisions cited by petitioners on procedendo (Petition, p. 26, n. 5) are to the same effect. Instead of supporting the petitioners' petition they are directly *contra*.

Petitioners do not and cannot complain that the Supreme Court of Texas has refused to proceed to judgment. Their only complaint is that it has proceeded to judgment in a given way—a way unsatis-

factory to them. Their real complaint is that they are dissatisfied with a part of the *opinion* of the Supreme Court of Texas. See *Interstate Commerce Commission v. United States*, 289 U. S. 385, 394; *Interstate Commerce Commission v. Waste Merchants Ass'n*, 260 U. S. 32, 34.

That the writ they are seeking is not a writ in the nature of procedendo is made plain by the fact that in order to create the basis for the operation of said writ they must first ask the Court to direct that the judgment already rendered in the State Court be vacated because erroneous—to do what is done in the exercise of appellate jurisdiction.

Livingston v. Dorgenois, 7 Cranch 577 is typical of the "procedendo" cases cited by petitioners. There the federal district court refused to try the case; instead, it entered a judgment that the proceeding should be "finally stayed." Whereupon, the plaintiff sued out a writ of error to this Court. Objection being made in this Court that such a judgment would not support a writ of error, plaintiff in error dismissed his writ of error and then moved that "a mandamus *nisi* to the judge of the district court of New Orleans in the nature of procedendo" be granted, and the writ prayed for was granted.

The inapplicability of the decision in *Livingston v. Dorgenois, supra*, is apparent. The case at bar has already been decided in the State Supreme Court and judgment has already been rendered. The writ that is sought, if issued, will direct, not a decision, but the vacating of a judgment already rendered. The direction in the writ that the judgment of the

State court should be vacated must necessarily rest upon a finding of error in the judgment previously rendered by that court. The whole purpose of the petition is to exhibit this alleged error in the judgment already entered. The so-called writ of "mandamus in the nature of procedendo" as sought to be used by the petitioners is nothing less than an appeal or certiorari—that is, a proceeding wherein the court called upon to issue the writ is called upon to review a complete record already made in the court below and to find error therein and then to direct that the judgment already rendered be vacated, and that further proceedings then be had in the cause under a stated limitation, this limitation being stated in the prayer of the Petition, p. 17, and explained in the Brief, pp. 25, 27.

The proceedings had in this Court in issuing such a writ would be precisely the same as the proceedings that are had in the ordinary case coming here directly by certiorari or appeal from a State court. This Court in such a case reviews the record and, finding error therein, reverses the judgment or decree of the State court and remands the case to that court for "further proceedings not inconsistent with this opinion." That, in effect, is the relief prayed for by petitioners here. They bring before this Court a record of the proceedings had in the State Supreme Court and allege error in such proceedings and ask this Court to review the record and, upon a finding of error, to direct that the judgment of the State court be vacated, and then further to direct that that court proceed in a manner not inconsistent with certain limitations to be set out in the judgment of this

Court and in the writ to be issued by it. The writ is to be called a writ of mandamus in the nature of a procedendo but it will have all the characteristics of the mandate issued in the ordinary case of certiorari or appeal from the State court.

Petitioners stated that they "have no adequate remedy except by the prosecution of this petition for a writ of mandamus in the nature of procedendo, for the reason that the judgment of the Supreme Court of Texas is not a final judgment." (Petition, p. 16.) They further state that "irreparable and inestimable damage will be done to petitioners" because the Supreme Court of Texas remanded the cause to the district court for a new trial "which will involve an extremely expensive and protracted hearing." Petitioner's real complaint is directed to the legislative wisdom expressed in the Act of Congress limiting this Court's appellate jurisdiction over judgments rendered in State courts—an expression of legislative policy that has stood unchanged since 1789. They stand in the same position as do all other litigants against whom interlocutory, or other judgments not final in character, have been rendered in the State courts.

2. Jurisdiction to issue the writ cannot exist on the theory of protecting a "prospective appellate jurisdiction." In the circumstances, there is "no appellate jurisdiction to protect." *Federal Power Commission v. Edison Co.*, 304 U. S. 375, 383.

3. Jurisdiction is further lacking because the decision of the State Court is based upon a non-federal

ground adequate to support it. This point is discussed under another heading, *post* pp. 36-53.

4. The mandate of this Court went down to the Court of Civil Appeals and not to the Supreme Court of Texas. This fact gives rise to the question as to whether under any view mandamus may issue to the Supreme Court of Texas, under Section 262 of the Judicial Code, as a writ to enforce the previously issued mandate of this Court. (See also, *post*, p.—.) Instead, it would appear that, if jurisdiction is to be exercised in such a case, it could only be exercised in an original action invoking this Court's original jurisdiction. That jurisdiction does not exist because, while the State of Texas is a party, the case as presented by the petitioners involves a controversy between the State and its own citizens. *California v. Southern Pacific Co.*, 157 U. S. 229, 257-259; and further because there exists no jurisdiction of an original action for mandamus. *Marbury v. Madison*, 1 Cranch, 137, 173-175. Further, original jurisdiction is lacking upon the ground pointed out in *Oklahoma v. A. T. & S. F. Ry. Co.*, 220 U. S. 277.

Point Two

The construction applied to the opinion of this Court by the Supreme Court of Texas is clearly correct.

The construction applied to the opinion of this Court by the State Supreme Court is fully stated in the opinion of the State Court (Petition, pp. 509-

515). No further argument is needed to demonstrate the correctness of the Court's reasoning.

The Court of Civil Appeals on its first review of this case held that the movant's (appellee in that court) "over-all" evidence did not constitute "the required quantum and character of proof necessary to establish the invalidity of the rate as being confiscatory." This Court reversed that ruling, and thereby held that movant's over-all evidence if accepted as true by the triers of the facts did constitute "the quantum and character of proof necessary to establish the invalidity of the rate as being confiscatory." This Court was reviewing the *ruling* made by the Court of Civil Appeals and not merely the *reasons* assigned in its support, and the force of this Court's decision extends to the ruling and is not limited by the reasons. It is manifest that if this Court had believed that the over-all evidence was insufficient as a matter of law "to establish the invalidity of the rate as being confiscatory," as was held by the Court of Civil Appeals, it would have affirmed the ruling of that court even if it had believed that the *reason* assigned by the court in support of the ruling was wrong; especially in view of the fact that all of the objections to the legal sufficiency of said evidence that were later made in the Court of Civil Appeals on its second review of the case were fully presented in this Court both in oral arguments and in the briefs that were filed.

Point Three

The proceedings taken in the Supreme Court of Texas were not "inconsistent with the opinion of this Court."

Here it may be appropriately pointed out that while petitioners claimed in their motion for rehearing in the State Supreme Court that the Court had misconstrued the opinion of this Court, they at no time claimed, or even suggested, that the Court was evading, obstructing or in any way violating the mandate of this Court. Instead, as we have elsewhere pointed out in detail, they conceded, in effect, that the Court had based its judgment, in part, on its decision of a question of State law and they distinctly assailed the correctness of the judgment upon that ground. Nowhere did they suggest that the alleged misconstruction of the opinion had resulted in an evasion or violation of the mandate.

The mandate was in the usual form employed in cases coming from State courts. It required no action of an affirmative nature. It did not require a decision such as was made by the Court of Civil Appeals and did not forbid such a decision as was made by the State Supreme Court. The Supreme Court of Texas did nothing "inconsistent with the opinion of this Court" when it held that the evidence was sufficient in law to raise the issue of confiscation and to support the findings of the jury settling that issue. There is nothing in this ruling "inconsistent with the opinion of this Court" and this is true even if it be assumed, contrary to fact, that the ruling was based in part upon an untenable construction of this Court's opinion. The argument on the other side rests upon the assumption that the mandate secured to the petitioners the affirmative right to have the Court of Civil Appeals hold that the evidence was insufficient in law to support the findings

on the issue of confiscation. No such right was secured to them. *Georgia Railway Co. v. Decatur*, 297 U. S. 620; *Schneider Granite Co. v. Gast Realty Co.*, 245 U. S. 288, 291.

The mere misconstruction of this Court's opinion could not violate the mandate. The misconstruction must be followed by a judgment inconsistent with the opinion, and no such judgment was rendered. The State Supreme Court reversed the judgment of both of the lower courts and remanded the case to the district court because of certain errors that were made in admitting and rejecting evidence in the course of the trial in the district court. In making its decision in respect to these errors it decided only questions of State law. The case is entirely different from a case like *Tyler v. Magwire*, 17 Wall. 253, 289-293, in which the State Court was making a plain attempt to circumvent the mandate of this Court.

In all that was done by the Supreme Court of Texas there cannot be found any evidence of any intention on the part of that Court to evade, circumvent or obstruct the mandate of this Court. The opinion of the Court shows a zealous effort on its part to apply a fair and reasonable construction to the opinion of this Court—a construction that would give full effect to the rulings made by the Court. The opinion shows an anxiety of purpose on the part of the Court to see to it that the mandate of this Court was carried out according to its full import and that nothing should be done that would deny full force to the rulings made by the Court.

Conflict must be found in some "proceeding" had in the Supreme Court of Texas "inconsistent with

the opinion of this Court," and that conflict cannot be found in the reasoning employed by the Supreme Court of Texas in support of a given ruling unless it can be demonstrated that the ruling was in conflict with the opinion of this Court. The mandate was not issued to compel the State Supreme Court to reason in a given way in support of a ruling that is plainly not "inconsistent with the opinion of this Court."

It is plain that if the State Court had construed the opinion of this Court just as petitioners claim it should be construed and yet had held that the evidence was sufficient in law to raise the issue of confiscation there would have been no conflict between that ruling or "proceeding" and mandate. This is because the ruling that the evidence was insufficient in law to raise the issue of confiscation is not "inconsistent with the opinion of this Court."

That the Supreme Court of Texas did nothing inconsistent with the mandate of this Court is made plain by the fact, admitted to be true by petitioners, that the granting to petitioners of the relief they seek would not *require* a change in the *judgment* of the Supreme Court of Texas, or even a change in its *ruling* that the evidence was sufficient to support the finding that the rate was confiscatory. (Petition, pp. 25, 27.) The burden devolves upon petitioners to show a material misconstruction of this Court's opinion—one that has injured them in the proceedings taken in the Supreme Court of Texas. This they have failed to do. They do not even claim that the issuance of the writ of mandamus by this Court will confer

upon them any benefit not already secured to them by the judgment of the Supreme Court of Texas.

The judgment of the State Supreme Court was in part favorable to the petitioners. The court set aside the verdict of the jury and the judgment of the district court, because of the trial errors referred to; this much was favorable to the petitioners. Their contention now is, in effect, that they were entitled to receive more from the Supreme Court of Texas and that the failure of that court to give them additional relief violated the mandate of this Court. The contention is without merit.

It is further submitted that what the State Supreme Court did in this case was not done under the mandate but under the State Constitution and laws giving it full power to review all decisions on questions of law made by the Court of Civil Appeals in cases coming to that court from District Courts. The mandate was not directed to the Supreme Court of Texas and all that Court did in the case was done after the Court of Civil Appeals had completed its "proceedings" under the mandate. All the State Supreme Court did, accepting petitioners' claims as correct, was to pass a wrong judgment upon what the Court of Civil Appeals had already done; that is, to commit an error of a judicial nature in determining the correctness of what the Court of Civil Appeals had done under the mandate. The writ of mandamus will not lie to correct errors of that nature. And the fact that no other remedy is available is immaterial. *Interstate Comm. Com. v. United States*, 289 U. S. 385, 394.

Point Four

The motion for leave to file the petition for mandamus should be denied because, if the judgment that petitoners seek to have vacated were a final judgment, this Court would not entertain jurisdiction to review it on certiorari or appeal. This is because the record shows affirmatively that the judgment of the State Court rests upon a non-federal ground adequate to support it.

The judgment of the State Supreme Court reversed the judgments of the two lower courts and remanded the case to the District Court for another trial. This Court therefore has no jurisdiction on certiorari or appeal because of the lack of finality of the judgment.

This lack of jurisdiction to review the case on certiorari or appeal furnishes the sole support for petitioners' claim that the mandamus should be granted. But this support is clearly insufficient because if the judgment were a final judgment this Court would not entertain jurisdiction. This is because the record shows that the judgment rests upon a non-federal ground adequate to support it. We refer here to the ruling of the State Supreme Court construing Article 6059, Texas Revised Civil Statutes, 1925. This ruling furnishes independent support for its judgment as is shown by its opinion and by the Return of the Respondent Justices.

As we have before shown, the construction and application of this statute was involved from the very

start of the litigation and throughout its progress. (*Ante*, pp. 9-16.)

Upon its first review of the case, the Court of Civil Appeals held that the evidence was insufficient in law to sustain the findings of the jury and trial court holding the rate to be confiscatory and rendered final judgment sustaining the rate order. This Court, on appeal, reversed that judgment because the Court of Civil Appeals, in determining the legal sufficiency of the evidence, applied "an untenable standard of proof and in disregard of the evidence which had been appropriately addressed to the Commission's findings and had been properly submitted to the jury." (*Lone Star Gas Co. v. Texas*, 304 U. S. 224, 242.)

Upon its second review of this case, the Court of Civil Appeals rendered the same judgment, again holding that the evidence was insufficient as a matter of law to sustain the finding of the jury and the District Court that the rate was confiscatory. (Petition, p. 116.) The State Supreme Court, on writ of error, reversed this ruling upon the ground (in addition to its view as to the construction and effect of the Court's opinion) that the Court of Civil Appeals, in holding the evidence to be insufficient in law, had applied an untenable standard, to-wit, its erroneous construction of the applicable State statute, Article 6059, Texas Revised Civil Statutes, 1925. (Petition, pp. 515-534.)

The Court of Civil Appeals, construing this statute, held that where there is any substantial evidence sustaining the action of the Commission its rate order must be held valid; or, as its opinion was con-

strued by the State Supreme Court, the Court of Civil Appeals held that "the findings of the Railroad Commission are final and conclusive on issues of fact if the evidence is conflicting on such issues." (Opinion of State Supreme Court, Petition, p. 505.)

The State Supreme Court, construing the same statute, held that, where the evidence is conflicting as to whether a rate is confiscatory—and the petitioners have here admitted, and the State courts and this Court have held, that the evidence on this issue was conflicting (Petition, pp. 548-549)—the District Court of Travis County, Texas (the review court designated in the statute) is empowered to make judicial findings of fact settling the conflicts in the evidence and determining all matters of weight and credibility. The State Supreme Court pointed out that the statute referred to and its prototype the railroad rate review statute, enacted in 1891, had been so construed for 50 years, and that the construction applied by the Court of Civil Appeals was clearly erroneous. (Petition, pp. 519-534.)

The State Supreme Court further held that, inasmuch as in this case the conflicts in the evidence had been settled by a jury, with its verdict approved by the District Court, and it having been found that the rate was confiscatory, the Court of Civil Appeals erred as a matter of law in setting aside this finding and in *rendering* judgment upholding the rate order. In making this ruling the Court of Civil Appeals applied a construction of the State statute that was held by the State Supreme Court to be erroneous. (Petition, p. 533; Return of the Justices, pp. 4, 9, 10.) The State Supreme Court further held that, because of

certain errors that had intervened in the trial in the District Court, the case should be remanded to that court for another trial. (Petition, p. 533, last par.; p. 539.)

In passing, it may be pointed out that the State Supreme Court did not deny the power of the Court of Civil Appeals, well established under the State practice, to set aside the verdict upon the ground that it was against the "overwhelming weight and preponderance of the evidence" and to *remand* the case for another trial upon that ground. The Court of Civil Appeals made that finding at the conclusion of its opinion (Petition, p. 116), but it did not carry the finding into effect with a proper judgment. Instead of *remanding*, it *rendered* judgment, and therein erred in the view of the State Supreme Court. (Petition, p. 533, last par.) If it had ordered a remand to the District Court, its action would not have been reviewable in the State Supreme Court. *Tweed v. Western Union Telegraph Co.*, 107 Tex. 247, 254. 255. In that case the State Supreme Court said:

". . . With a case thus remanded under the judgment of the Court of Civil Appeals, it would amount to a denial of its authority to determine the facts and set aside a verdict on the evidence for this court to assume the power of rendering the judgment because it differed with the conclusion reached by that court upon the effect of the evidence.

"Beck v. The Texas Company, 105 Texas, 303, 148 S. W. 295, furnishes no analogy. The distinction between that case and this one is manifest. There the court did not exercise the authority it possessed to set aside the verdict on the facts and *remand* the cause. It *rendered* judgment in favor of the defend-

ant on the facts; and in doing so made no finding of fact which would defeat recovery. In differing with the Court of Civil Appeals upon the question of law as to the effect of the evidence, we were authorized to affirm the judgment of the lower court, since the Court of Civil Appeals has not sought to exercise its province of determining the facts and ordering the case remanded for another trial because of its difference with the jury on the facts, and in affirming the judgment we therefore in nowise trenched upon its authority. Had the Court of Civil Appeals there remanded the case instead of rendering judgment, we would have been compelled to respect its judgment to that extent and could not have affirmed the trial court judgment." (Italics by the Court.)

If the Court of Civil Appeals, after making the finding on the facts referred to, had *remanded* the case, the State Supreme Court would have respected "its jurisdiction to do so, even though its holdings on the legal or probative value of the facts were clearly erroneous." *Wilson v. Hagins*, 116 Tex. 538, 546. The State Supreme Court reversed the decision of the Court of Civil Appeals because that Court, conceding that the evidence was conflicting on the issue of confiscation, attempted to substitute its findings for those of the jury and District Court and to *render* final judgment thereon. *Post v. State*, 106 Tex. 500, 501. "The constitution and statutes defining and regulating the jurisdiction and practice of the Supreme Court and of the Courts of Civil Appeals have been uniformly so construed since a few years after their original adoption." *(Marshburn v. Stewart*, 113 Tex. 507, 519.)

So much in passing. The point now made is that,

if there had been no trial errors requiring a reversal, and if the State Supreme Court, applying the rule stated in *Tweed v. Western Union Telegraph Co.*, *supra*, had affirmed the judgment of the District Court, thus rendering a final judgment, this Court would have had no jurisdiction to review that judgment on certiorari or appeal because it would have been apparent from the record that the judgment of the State Supreme Court rested upon a non-federal ground adequate to support it; that is, upon the ground that the Court of Civil Appeals, in holding the evidence insufficient in law to sustain the finding of confiscation, had applied an untenable construction of the applicable State statute, Article 6059, *supra*.

That the judgment of the State Supreme Court rests upon two grounds—(1) its construction of this Court's opinion; and (2) its construction of the applicable State statute—was conceded by the petitioners in their motion for rehearing filed in the State Supreme Court after the Court had handed down its opinion, which petitioners are now asking the Court to reverse through use of the extraordinary writ of mandamus. In that motion, petitioners first assailed the correctness of the State Supreme Court's construction of the opinion of this Court (Petition, p. 548); and then, in full recognition of the fact that the State Court's judgment rested upon two grounds, and not merely on one, and that it would be futile to assail that judgment upon only one ground, petitioners in their Second Assignment of Error assailed the State Supreme Court's construction and application of the State statute above re-

ferred to. We quote the Second Assignment of Error from their motion for rehearing, as follows:

"This Court erred in holding that upon an appeal to the District Court under Article 6059, Revised Civil Statutes, the issues of the justice and reasonableness of the order and whether the order is confiscatory must be tried de novo as in ordinary civil cases." (Petition, p. 555.)

The argument that follows this assignment of error construes the opinion of the State Supreme Court just as it is construed in this brief and as it is construed in the Return of the Respondent Justices herein. (Petition, pp. 555-565.) We quote the following statement made by petitioners in that argument:

"The process by which this Court concludes that the trial before the District Court in gas rate matters must be de novo, in the sense that the proceedings before, and the findings of, the Railroad Commission must be completely ignored, is fallacious . . ." (Petition, p. 556.)

Petitioners thus told the Supreme Court of Texas that it had based its judgment upon two grounds and they requested the Court to correct both rulings and not merely one.

Petitioners in their petition make no reference to the fact that, in their motion for rehearing filed in the Supreme Court of Texas, they interpreted the opinion of that Court as being based upon two grounds: one, the construction of this Court's opinion (Petition, pp. 548-555); and the other, its

construction and application of the applicable State statute, Article 6059 (Petition, pp. 555-568). Instead, in their supporting brief, they now assert that the action of the State Supreme Court was based solely upon that Court's construction of the opinion of this Court. (Petition, p. 20.)

One of the grounds upon which the State Court based its judgment is presented in the petition for mandamus and is therein challenged as erroneous, just as it was challenged in the motion for rehearing filed in the State Supreme Court. The second ground that was challenged as erroneous in the State Supreme Court is not mentioned in the petition for mandamus, apparently because it involves a non-federal matter that cannot be reviewed or corrected by this Court even if it be erroneous. It is plain that if this Court had possessed jurisdiction to review this second ground upon which the State Court based its decision, they would have assailed this ruling in this Court just as they assailed it in their motion for rehearing filed in the State Court.

By this indirect and clearly improper means the petitioners seek to enlarge the jurisdiction of this Court. They seek in a mandamus proceeding to obtain the correction of a judgment of the Supreme Court of Texas of which this Court would have no jurisdiction on certiorari or appeal because it rests upon an adequate non-federal ground. They seek in effect, the reversal of a judgment of the Supreme Court of Texas not reviewable here because it is not a final judgment.

The petitioners in their prayer impliedly recognize that this Court does not sit to review *opinions*

but only *judgments* of State courts; that it does not sit "to determine questions of law *in thesi*." *Marye v. Parsons*, 114 U. S. 325, 330. Petitioners have prayed that the *judgment* of the Supreme Court of Texas be reversed, and not merely that the *opinion* of that Court be corrected on the single point presented in the petition for mandamus. (Petition, pp. 17-18, 27.) A judgment of the Supreme Court of Texas may not be reversed or vacated by this Court unless this Court's jurisdiction is properly invoked in a petition (whether for mandamus or certiorari) that challenges all of the grounds upon which the assailed judgment has been made to rest; and unless it is made to appear that these grounds are reviewable by this Court under the statutes and rules defining and limiting its jurisdiction.

Petitioners in effect admit that they are not entitled to the relief prayed for in their petition, i.e., the writ of mandamus to compel the Supreme Court of Texas to vacate its judgment. In their supporting brief petitioners say:

"In the present case, petitioners do not ask that the proper discretion of the Supreme Court of Texas be restricted, *or that it be directed to enter any particular judgment.* Petitioners merely ask that the Supreme Court of Texas be required to vacate so much of its judgment as reversed the judgment of the Court of Civil Appeals on the ground that that Court was precluded from considering the sufficiency of the evidence on the issue of confiscation by the judgment of this Court. If the relief here prayed for is granted, the Supreme Court of Texas will be left free to decide, *under Texas law*, whether the judgment of the Court of Civil Appeals that the

evidence was insufficient as a matter of law to show confiscation should be affirmed or reversed, granting that the Court of Civil Appeals had the authority under this Court's judgment to pass on the sufficiency of the evidence by the application of the proper standard." (Petition, p. 25.) (Our italics.)

The Supreme Court of Texas has already decided "under Texas law" the question as to whether the judgment of the Court of Civil Appeals should be affirmed or reversed. It has held that the Court of Civil Appeals erred in denying the authority of the District Court of Travis County (the review court designated in Article 6059) to settle conflicts in the evidence and then to render such judgment as might be proper with the conflicts settled. It has held that the Court of Civil Appeals erred in holding that in this State "the findings of the Railroad Commission are final and conclusive on issues of fact if the evidence is conflicting on such issues." (Petition, p. 505.)

Petitioners here say that they merely ask that the Supreme Court of Texas "be required to vacate so much of its judgment as reversed the judgment of the Court of Civil Appeals on the ground that that Court was precluded from considering the suffciency of the evidence on the issue of confiscation by the judgment of this Court." (Petition, p. 25.) The Supreme Court of Texas did not hold that the Court of Civil Appeals was precluded from holding the evidence was insufficient as a matter of law to show confiscation merely because of its construction of the opinion of this Court. The Court further held that, under the review statute, Article 6059, the District

Court was empowered to try the case de novo "as any other civil cause in said court" and to determine all matters of weight and credibility and to make findings of fact settling the conflicts in the evidence; and that the District Court having made such findings, the Court of Civil Appeals was without power to set aside said findings and substitute therefor its own findings and then *render* final judgment, instead of *remanding* the case to the District Court for another trial.

Concluding its discussion of the review statute the State Supreme Court said:

"From all that we have said it is evident that that part of the judgment of the Court of Civil Appeals which *renders* judgment for the State and the Railroad Commission upholding this gas rate order cannot stand. We shall now examine this record to determine whether we will affirm the judgment of the district court or reverse the same, and remand the cause for a new trial." (Petition, pp. 533-534, our italics.)

This clearly discloses the ground upon which the State Supreme Court based its judgment; that is, upon the action of the Court of Civil Appeals in attempting to substitute its findings for those of the trial court and jury in a case where the evidence was conflicting, and contrary to the State Supreme Court's construction of the review statute and contrary to the settled rule of practice in this State as announced in *Tweed v. Western Union Telegraph Company, supra,* and many similar cases.

Petitioners ask this Court that the Supreme Court be "required to vacate so much of its judgment" as

was based upon an alleged misconstruction of this Court's opinion. That part of the judgment here referred to was also based upon the State Court's construction of the applicable State statute; the entire judgment was based upon the State Court's construction of the statute. It was based upon each of two separate and independent grounds—the construction of the opinion and the construction of the State statute. So, in essence, petitioners are asking this Court to reverse the decision of the State court in respect to the construction of the statute. This must be true because the construction of the statute furnishes adequate support for the judgment and hence, a reversal of the judgment would amount to an assertion of power to reverse the decision of the State Court in respect to the construction of the statute—the support for the judgment.

In the same connection petitioners assert that they do not ask that the Supreme Court of Texas "be directed to enter any particular judgment." (Petition, p. 25.) Then why should the writ of mandamus issue to compel the Court to vacate the judgment already rendered? The record makes it plain, and the Return of the Justices emphasizes the fact that, unless the Supreme Court of Texas should change its ruling in respect to the construction of the State statute, it will render the same judgment that it has already rendered.

The petitioners admit, in effect, that, even if they are granted the relief sought, the Supreme Court may render the same judgment. We quote from their supporting brief:

"We cannot say for certain what the judgment of the Supreme Court of Texas will be if this Court grants the relief here prayed for." (Petition, p. 27.)

Here petitioners in effect admit that they are asking this Court to compel the State Supreme Court to change, not its *judgment*, but its *opinion*. And they ask this notwithstanding the fact that they admit they are in doubt as to whether a change in the opinion will bring about any change in the judgment favorable to them. They are asking that the writ of mandamus issue against the Judges of the State Court simply upon the chance and in the hope that, in some way or other not pointed out by them, the State Court, acting under State law, may give them relief beyond that awarded to them under its former judgment.

In all of this petitioners are confusing the *opinion* of the Supreme Court of Texas with its *judgment*. They ask that its judgment be vacated, and yet it is plain that their complaint is directed at its opinion —one ruling discussed in the opinion. This Court has many times held that it will not reverse a correct judgment to get at an incorrect opinion—and certainly not when only one ruling discussed in the opinion is claimed to be incorrect. In *McClung v. Silliman*, 6 Wheaton 598, 603, in an opinion written by Mr. Justice Johnson, the Court said:

"It is not the first time that this Court has encountered similar difficulties, in its advance to questions brought up from other tribunals. It has avoided them by deciding that it is not bound to encounter phantoms . . . And, notwithstanding express evidence of the contrary, this Court feels itself sanc-

tioned, in referring the decision of the State Court, in this case, to the ground on which it ought to have been made, instead of that on which it appears to have been made. The question before an appellate court is, was the *judgment* correct, not the *ground* on which the judgment professes to proceed." (Italics by the Court.)

Petitioners are not entitled to have a mandamus issue out of this Court to control the logic of the Supreme Court of Texas. "A party is bound by the judgment, but not the logic, of courts." *Sheffield v. Goff*, 65 Tex. 354, 358. The petitioners have not been prejudiced by the reasoning of the Supreme Court of Texas because it conclusively appears that the Court's judgment would have been the same even if the reasoning complained of had been corrected.

This conclusively appears when we turn to the motion for rehearing filed by the petitioners in the State Supreme Court. They there separately complained of the two rulings: (1) The construction of the opinion of this Court; and (2) the construction and application of the State statute. It is made plain by this motion that, even if the State Supreme Court had sustained the first assignment of error presented in the motion (Petition, p. 548) and had construed the opinion of this Court in the way that petitioners claim it should be construed, the judgment of the Court would have stood unaffected and unchanged because adequately supported by the second and independent ground complained of by the petitioners (Petition, p. 555)—the construction of the State statute by the Court. (See also the Return of the Justices.)

In *Brobst v. Brock*, 10 Wall, 519, 528, the defendant in an ejectment case had three defenses, all of which were upheld in the trial court. Error was assigned to the ruling sustaining one of these defenses. The Court held that it was unnecessary to determine the question thus raised unless it could be demonstrated that the other defenses were untenable. The Court, through Mr. Justice Strong, said:

"It is true the defendant set up that he had acquired title under that sale, and, had that been his only defense, it would be necessary to consider whether it was sufficient to extinguish the equity of redemption. But there were several other defenses, two of which the court below ruled sufficient to protect the defendant in his possession. If the ruling was correct, or if either of these defenses was perfect, it matters not what may have been the instruction given to the jury respecting other parts of the case. It would be idle to reverse the judgment and send the case back for a new trial if it be certain that the plaintiff cannot recover in the action."

In the circumstances the writ prayed for should be refused for the general reason underlying *In re Blake*, 175 U. S. 114, 120. No clear necessity is shown for the issuance of the writ. Even petitioners are in doubt as to the nature of their rights and as to the duty of the respondents. They admit that they are unable to state what relief should be accorded them by the respondents. The case clearly falls under the rule announced in cases like *Ex parte Cutting*, 4 Otto 14, and *Kendall v. United States*, 12 Peters 524.

The position of the petitioners is made plain when

they attempt to state what injury and damage they may suffer if they are not accorded the relief prayed for. This they state is the expense and inconvenience of another trial in the district court (Petition, p. 17). This is an insufficient ground. *Petroleum Exploration, Inc., v. Public Service Commission*, 304 U. S. 209, 222-223. There is the additional objection that the petition does not show that the necessity for a second trial has resulted from the construction placed by the State Supreme Court on the opinion of this Court. The petition, including the exhibits attached thereto, and the Return of the Justices show that even with the alleged error complained of corrected, petitioners still would be subjected to the expense of a second trial. Petitioners are unable to show that the vacating of the judgment will promote or advance any right possessed by them.

Petitioners say that they cannot know with certainty what the Supreme Court of Texas will do with the case if the writ should issue. There is another uncertainty inhering in the situation. This grows out of the fact that the attack on the rate order involves not only the claim of confiscation but the claim that the Commission violated the State statute by prescribing a rate that was *unjust and unreasonable. (Ante*, pp. 10-11.) That ground of attack rests upon State law only; it is distinct from *and broader than*, the claim of confiscation. *Railroad Commission v. H. & T. C. Ry Co.*, 90 Tex. 340, 353, 354. It is a special ground of attack that may or may not be conferred by State law. *L. & N. Ry. Co. v. Garrett*, 231 U. S. 298, 313, 314. On another trial the findings made may be such that the

case may turn on this ground of attack based solely on the law of the State—Article 6059.

For another reason the motion for leave to file the petition should be denied: Even if the single error complained of in the petition for mandamus were presented to this Court in a petition for certiorari and in a case of which the Court had appellate jurisdiction, the petition should be denied because it does not adequately and fairly disclose the questions involved and the grounds upon which the Supreme Court of Texas rested its decision. *Sutter v. Midland R. R. Co.*, 280 U. S. 521.

This Court will hardly take jurisdiction of this mandamus proceeding to correct an alleged error that would not be corrected if the same point were presented in a petition for certiorari to review a final judgment of the Supreme Court of Texas. Obviously, the petitioners are not entitled to have a more liberal rule applied to their petition for the extraordinary writ of mandamus than would be applied to a petition for certiorari. Petitioners are not entitled to have the judgment of the Supreme Court of Texas vacated by the writ of mandamus in a collateral proceeding when upon the same showing in a petition for certiorari and in a direct proceeding they would not be entitled to have it vacated.

The petition for mandamus wholly fails to disclose the fact, plainly stated in the opinion of the State Supreme Court and in the Return of the Justices, that its reversal of the judgment of the Court of Civil Appeals was rested upon two grounds; one ground presented and challenged in the petition for mandamus and the other ground not set forth or challenged at all.

The second ground cannot be reviewed or corrected by this Court even if erroneous (1) because it involves no more than a ruling on a question of State law which could not be corrected even on certiorari; and (2) because, even if the case were here on petition for certiorari, the Court would confine its review of the case to the grounds upon which the petition was based. The review would be confined to "the matter relied upon in asking the intervention of this Court." *Alice State Bank v. Houston Pasture Co.*, 247 U. S. 240, 242. The review would be "no broader than that sought by the petitioner." *Helis v. Ward*, 308 U. S. 365, 370; *General Pictures Corp. v. Electric Co.*, 304 U. S. 175, 177. This rule would be applied even if the second point decided involved a Federal question. The Court would assume the correctness of the ruling of the State Supreme Court in respect to it because that ruling was not complained of by the petitioners. *Prudence Co. v. Fidelity and Deposit Co.*, 297 U. S. 198, 208; *Clark v. Williard*, 294 U. S. 211, 216.

Point Five

The motion for leave to file the petition for mandamus in the nature of procedendo should be denied because the State Supreme Court has already "proceeded" to a decision. The writ prayed for by petitioners is, in substance, a writ to compel the State Supreme Court to reverse its decision already made and to render a new decision in a given way.

Assuming, contrary to what we believe the law to be, that this Court has jurisdiction to issue a writ of

mandamus to a State court, we submit that this is not a case where it should issue. Petitioners have not brought their case within the well established rules that limit the issuance of the writ in cases where jurisdiction exists.

The Supreme Court of Texas has already rendered a decision in this case. What petitioners need and what they are attempting to obtain is a remedy in the nature of an appeal. This is made plain by the prayer of the petition. Petitioners pray that the Court *first* direct the State Supreme Court to reverse its decision already made and then to proceed to render another decision conforming to a limitation or condition to be prescribed in the writ. (Petition, pp. 17, 25, 27.) Petitioners are thus attempting to use the writ of mandamus in the nature of procedendo as a substitute for certiorari or appeal. They are asking this Court to do in effect what it does in the ordinary case coming to it from a State court; that is, to examine the record and, upon finding error therein, to reverse the judgment and direct that further proceedings be had in the case "not inconsistent with the opinion of this Court." Here, the writ prayed for is to direct the State court first to vacate its decision already made and its judgment already rendered and then to make another decision and to render another judgment not inconsistent with a limitation or condition prescribed by this Court, to be set forth in the so-called writ of mandamus in the nature of procedendo.

It is plain that a reversal of the judicial discretion already exercised by the Supreme Court of Texas lies at the foundation of petitioners' case. The judg-

ment already rendered must be vacated before there can be any room for the operation of their "writ of mandamus in the nature of procedendo." Only in this way can they cast upon the Supreme Court of Texas the duty to further proceed with the case. This demonstrates that petitioners are attempting to use the writ prayed for as a substitute for the remedy of appeal—and in a case where appellate review is denied by law. A writ, whatever it may be called, that reverses a judgment in order to create the duty to again examine the case serves the office of appeal or writ of error. *Commissioner v. Whiteley*, 4 Wall. 522, 533.

In *Interstate Commerce Commission v. United States*, 289 U. S. 393-394, this Court said:

"Errors of law in the discharge of a function essentially judicial are not subject to be corrected through the writ of mandamus any more than errors of fact. If the Commission had declined to listen to the claim for reparation, or finding reparation due had declined to order payment, mandamus might have been available to hold it to its duty. That is not what happened. The Commission heard the complaint and proceeded to a decision. If the mandamus were to stand, the result would not be to compel the Commission to adjudicate the cause, for that it has already done; the result would be to compel an adjudication in a particular way. The rule is elementary that this is not the function of the writ. Mandamus is an appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal or writ of error to dictate the manner of his action. *Interstate Commerce Commission v. Waste Merchants Ass'n*, 260 U. S. 32, 34; *Wilbur v. Kadrie*, 281 U. S. 206; 218; *Interstate*

Commerce Commission v. N. Y., N. H. & H. R. Co., 287 U. S. 178, 204."

After praying that this Court issue a writ requiring the Justices of the State Supreme Court to vacate the judgment heretofore entered by the Supreme Court of Texas on April 30, 1941, petitioners further pray that they be directed to then proceed "to take such further action and render such further judgment as shall be proper under the laws of the State of Texas, conceding the power, jurisdiction, and authority of the said Court of Civil Appeals, under the judgment, mandate, and opinion of this Honorable Court, to consider and pass upon the sufficiency of the evidence to sustain the verdict of the jury in the District Court by applying the standard of proof approved by this Honorable Court." (Prayer of Petition, p. 18.)

The judgment, opinion and mandate of this Court did not require that the State Supreme Court should render a judgment conceding the power and authority of the Court of Civil Appeals to consider and pass upon the sufficiency of the evidence to sustain the verdict of the jury. Petitioners are attempting, by use of the writ of mandamus, to broaden the former judgment, opinion and mandate of this Court.

Furthermore, to issue a writ thus conditioning the power of the Supreme Court of Texas, in making a new decision in the case, is to compel that court to decide the case in a given way. To prescribe a condition that must be satisfied in arriving at a decision is to control the decision. To compel the Supreme Court of Texas, in rendering another judgment, to comply with conditions not comprehended within the

judgment already rendered is to control its judicial discretion. In *Life and Fire Insurance Company v. Adams*, 9 Peters 573, 602, this Court said:

"To extend the judgment to subjects not comprehended within it, is to make a new judgment. This court is requested to issue a mandamus to the court for the eastern district of Louisiana, to enter a judgment in a cause supposed to be depending in that court; not according to the opinion which it may have formed on the matter in controversy, but according to the opinion which may be formed in this court, on the suggestions of one of the parties. This court is asked to decide that the merits of the cause are with the plaintiffs; and to command the district court to render judgment in their favour."

Conclusion

The Supreme Court of Texas has judicially considered and decided what should be done (1) under the opinion and mandate of this Court, and (2) under Article 6059, Texas Revised Civil Statutes of 1925, providing for judicial review of orders of the Railroad Commission fixing gas utility rates; such review to be in a *de novo* trial in the District Court of Travis County. Its careful and painstaking consideration of the case before it is fully evidenced by its opinion.

The Court of Civil Appeals on its second review of the case held that the evidence was insufficient in law to raise the issue of confiscation and rendered judgment sustaining the rate order. The Supreme Court of Texas by its judgment reversed this judg-

ment of the Court of Civil Appeals and held that the evidence was sufficient in law to raise the issue of confiscation and to support the finding on that issue made in the State district court. This judgment of the State Supreme Court was based upon two independent grounds, each adequate to support it: (1) the construction of this Court's opinion and mandate; (2) Article 6059, Texas Revised Statutes of 1925. This is fully and clearly shown by the opinion of the Supreme Court of Texas and by the Return of the Justices thereof herein filed.

The motion for leave to file should be denied:

1. The Court is without jurisdiction to issue the compulsory writ of mandamus to the State Supreme Court. The statutes of Congress, the decisions and practice of this Court, and the policy underlying our federal system are all opposed to the issuance of compulsory process such as mandamus to a State court.

2. At least jurisdiction is doubtful, and the doubt should be resolved against the exercise of jurisdiction in this case. Plainly, this is not such a case as calls upon the Court to exercise a jurisdiction that it has never before exercised.

3. The Texas Supreme Court correctly construed the opinion of this Court.

4. The Texas Supreme Court has done nothing "inconsistent with the opinion of this Court." The opinion and mandate of this Court did not require

the Supreme Court of Texas to decide this case under the conditions set forth in the prayer of the Petition (pp. 17-18.) These conditions not being comprehended in the opinion and mandate, they should not be imposed now, thus broadening the opinion and the mandate.

5. This Court will not and cannot change the construction of Article 6053 adopted and announced by the Texas Supreme Court, and made the basis for its decision. It very clearly appears from the opinion of that court and the Return of its Justices filed herein that the judgment entered by it in the case before it will be the same as the one heretofore rendered on April 30, 1941, even if the relief sought by petitioners is granted. In the circumstances, even if this Court had jurisdiction in its discretion to issue the writ of mandamus to a State court, it would not do so because the issuance of the writ would accomplish nothing. The extraordinary writ of mandamus is designed for something better than futility.

6. The writ of mandamus in the nature of procedendo should not be allowed to do by indirection what cannot be done directly. The Supreme Court of Texas has "proceeded"; it has already rendered a judgment fully disposing of the case before it. This judgment is not a final judgment such as is subject to direct review in this Court. Petitioners should not be allowed an indirect review, tantamount to an appeal or certiorari, in the way attempted because (1) the issuance of the writ would amount to the exercise of appellate jurisdiction, in violation of the legisla-

tive rule requiring final judgments as the essential basis for review—the rule established in 1789 and remaining unchanged since; (2) even if the judgment of the Supreme Court of Texas were final (and admittedly it is not) this Court would not entertain jurisdiction to review by certiorari or appeal because the State Supreme Court judgment rests upon a non-federal ground adequate to support it; and (3) the issuance of the writ in the form as prayed for, prescribing the conditions under which the State Supreme Court should proceed in again deciding the case, would invade the judicial discretion of that court.

Respectfully submtited,

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